Court upholds military ban on homosexual conduct

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SAN FRANCISCO — The military's ban on homosexual conduct on or off duty was upheld Friday by a federal appeals court.

The 2-1 decision was the third straight federal appeals court ruling upholding the government's "don't ask, don't tell" policy on gays in the military. But it was the first appellate ruling on the provisions that require discharge for homosexual conduct.

The 9th U.S. Circuit Court of Appeals rejected arguments by a discharged sailor that the policy is unconstitutional because it treats homosexuals and heterosexuals differently.

The Navy has defended the policy as necessary to maintain unit cohesion, preserve privacy and reduce sexual tension.

Circuit Judge Pamela Rymer ruled that those reasons are not irrational or based merely on prejudice. She also cited the courts' traditional deference to military judgment.

In a dissent, Circuit Judge Betty Fletcher said the policy of discharging homosexuals, but not heterosexuals, for private off-duty sexual conduct is discrimination based entirely on prejudice against homosexuals.

"Gay men and lesbians are no less able and no more prone to misconduct than their heterosexual counterparts," Fletcher said. "Even in the military context, an entire class may not be singled out for disfavored treatment because of animosities towards that class."

The ruling upheld the 1995 discharge of Petty Officer Mark Philips of Seattle, who disclosed his homosexuality to a division officer while serving on the USS Nimitz in 1992, shortly after the election of President Clinton.

Philips, a four-year veteran with an excellent service record, said in response to later inquiries that he had sex with men outside the base and would continue to do so.

Clinton, who had promised to eliminate the ban on homosexuals, agreed in 1993 to a "don't ask, don't tell" policy that bans inquiry into service members' sexual orientation but provides for the discharge of those who declare their homosexuality or engage in homosexual acts on or off duty.

Philips was given an honorable discharge after the policy took effect in 1994. The discharge was upheld by a U.S. District Court judge.

Michael Adams of the American Civil Liberties Union's Lesbian and Gay Rights Project, which represented Philips, said he was disappointed by the ruling but "confident that we ultimately will prevail on that argument."

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